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The Second Practicing Law Institute will be held at the Notre Dame College of Law May 13-14, 1949. On the morning of May 13, Professors William D. Rollison and Jack R. Miller, of the College of Law, will discuss will clauses appropriate to the 1948 Revenue Act. In the afternoon, former Judge Dan Flanagan will speak on Appellate Procedure. In the evening, the annual senior banquet will be held. The principal speaker will be the Honorable Tom Clark, Attorney General of the United States. On May 14, Federal Judge Luther M. Swygert, of the District Court for the Northern District of Indiana, will conduct a session on Federal Rules.

NOTES

CRIMINAL LAW—INDIANA JURIES IN CRIMINAL CASES AS JUDGES OF LAW UNDER CONSTITUTIONAL RELIC.—Article 1, section 19 of the Indiana constitution of 1851 provides that "In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts." Among the more striking results of this provision may be cited: Inability of the trial judge to give instructions as to the law binding in conscience on the jury;¹ the fact that the jury is not bound by decisions of the state supreme court;² the practice of allowing counsel to argue questions of law to the jury;³ and the furnishing of an additional ground of appeal from conviction, unrelated to the merits of the case, where the instructions of the trial judge infringe this right of the jury to determine what the law is.⁴ Behind such particular effects, there also looms the broader, speculative question as to how many unwarranted acquittals result from exercise by the jury of their strange prerogative. Various results of the doctrine—and limitations placed upon it—will be considered further; but it is believed that the effects already mentioned will suffice to support the statement that the doc-

¹ E.g., *Lynch v. State*, 9 Ind. 541 (1857); *Williams v. State*, 10 Ind. 503 (1858); *Schuster v. State*, 178 Ind. 320, 99 N. E. 422 (1912); *Cunacoff v. State*, 193 Ind. 62, 138 N. E. 690 (1923); *Chesterfield v. State*, 194 Ind. 282, 141 N. E. 632 (1923); *Burris v. State*, 218 Ind. 601, 34 N. E. (2d) 928 (1941).

² *Clifford v. State*, 56 Ind. 245 (1877); *Keiser v. State*, 83 Ind. 234 (1882); *Chesterfield v. State*, 194 Ind. 282, 141 N. E. 632 (1923). *But see* *Fowler v. State*, 85 Ind. 538, 541 (1882) (dissent from majority approval of *Keiser* case).

³ *Lynch v. State*, 9 Ind. 541 (1857); *Harvey v. State*, 40 Ind. 516 (1872); *Stout v. State*, 96 Ind. 407 (1884); *Klepfer v. State*, 121 Ind. 491, 23 N. E. 287 (1890).

⁴ E.g., *Williams v. State*, 10 Ind. 503 (1858); *Keiser v. State*, 83 Ind. 234 (1882); *Hudelson v. State*, 94 Ind. 426 (1883); *Schuster v. State*, 178 Ind. 320, 99 N. E. 422 (1912); *Burris v. State*, 218 Ind. 601, 34 N. E. (2d) 928 (1941). *But cf.* *Landreth v. State*, 201 Ind. 691, 171 N. E. 192, 72 A.L.R. 891, annot. 899 (1930) (instruction disapproved but found harmless).

trine is dangerous to defendant and public alike, and detrimental to the orderly administration of justice. Jurors obviously do not know the law, other than as given them by the court. It is difficult to perceive how a theory which assumes that they do can be justified.

The doctrine is also an anachronism. It had considerable vogue in the United States in earlier years, but has faded, in large part, from the juridical scene with the passage of time and the development of a competent American judiciary. Mistrust of the bench, resulting both from the arbitrary decisions of English judges in colonial days⁵ and from lack of a trained judiciary in the early years of our independence, seems to have been the primary reason for the American development of the doctrine. However, the various legal theories propounded as justification for violating the principle that *ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores*, were derived from earlier English precedents of uniformly faulty logic.⁶ These theories were based in large degree on the power of the jury in criminal cases to return a general verdict, which gave rise to the erroneous impression that the jury must have a right to determine, and not merely to apply, the law.

Whatever the bases relied upon, many states conferred on juries, in varying degrees, the right to determine questions of law in criminal cases.⁷ As late as 1894 it was necessary for the United States Supreme Court to rule, over a strong dissent, that in federal courts, criminal juries had no such powers.⁸ Today, however, the flaws in the theories supporting the doctrine and the disconcerting effects of its application have resulted in its general abandonment.⁹ Most of the states which once gave the doctrine legislative or constitutional sanction have abolished or emasculated it. Among the very few exceptions, Indiana may

⁵ "In many of the colonies, immediately preceding the revolution, the arbitrary temper and unauthorized acts of the judges, holding office directly from the crown, made the independence of the jury, in law as well as fact, a matter of great popular importance." *Williams v. State*, 32 Miss. 389, 396 (1856).

⁶ The power of the jury to go wrong was sometimes confused with a right to make law; Fox's Libel Act, 1792, 32 GEO. III, c. 60, giving the jury the power to render a general verdict in libel actions, as in other criminal cases, was misconstrued to mean that in such other cases the jury could make law; the fact that jury acquittal is final was likewise taken as indicating such a right in the jury. These theories and authorities rebutting them are briefly discussed in 15 MINN. L. REV. 830, 831 (1931), and more thoroughly in Coe, *The Province of Juries in Criminal Cases*, 39 CENT. L. J. 321 (1894); Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34, 49 (1943).

⁷ For a thorough compilation of the various statutory and constitutional provisions, see Howe, *op. cit. supra* note 6.

⁸ *Sparf et al. v. United States* 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895).

⁹ For a state-by-state study, see Howe, *op. cit. supra* note 6.

claim the dubious distinction of giving the outmoded relic its widest present day application.¹⁰

Yet the doctrine was not widely adhered to in Indiana during the state's early history. The original state constitution provided that ". . . In all indictments for libels, the Jury shall have a right to determine the law and the facts, under the direction of the Court, as in other cases."¹¹ Similar provisions, taken from Fox's Libel Act,¹² were adopted by a considerable number of states. Properly construed, they merely preserved the right of the jury to render a general verdict in libel cases; invasion of this right by the English courts¹³ occasioned the passage of the original Act. While some Indiana decisions expanded this provision into a right in the jury to decide questions of law,¹⁴ the prevailing view seems to have been that if the jurors found contrary to the law laid down by the court, they violated their oaths.¹⁵ This is the rule wherever the jury is denied a right to judge law.

The greatly broadened provision of the 1851 constitution came into being with practically no record of its being discussed by the constitutional convention,¹⁶ leading one judge to comment:¹⁷

If the framers of that instrument had intended to work so radical a change in the practice of administering the laws as to make the jury omnipotent and the judge a mere automaton to record their findings, it is rather strange that so great a change should not have been talked about by them. . . .

Interpretation of the provision has made its effect less sweeping than this judge feared; yet the question that he posed, whether the giving of an instruction that the jury was under a duty to believe the law

¹⁰ Maryland is the only other state which still gives the doctrine a comparable interpretation. In that state the great majority of criminal cases are tried without a jury, so that the scope of the doctrine is, at least, greatly limited arithmetically. This fact has been credited with allowing "fair justice and success" in Maryland criminal cases. Dennis, *op. cit. supra* note 6 at 39.

¹¹ IND. CONST. Art 1, § 10 (1816).

¹² 1792, 32 GEO. III, c. 60. See articles cited *supra* note 6.

¹³ King v. Shipley (Dean of St. Asaph's Case), 4 Doug. 73, 99 Eng. Rep. 774 (1784).

¹⁴ Warren v. State, 4 Blackf. 150 (Ind. 1836).

¹⁵ Townsend v. State, 2 Blackf. 151 (Ind. 1828); Carter v. State, 2 Ind. 617 (1851). That such was the prevailing rule prior to the adoption of the constitution of 1851, see Williams v. State, 10 Ind. 503 (1858).

¹⁶ The phrase "in all criminal actions" was added to the existing libel provision in open debate, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION 1389 (Indiana, 1850); but apparently committee action created the final provision without further floor debate. A proposal "that the jury in criminal cases find upon the facts only" was referred to the committee on organization of courts, CONVENTION JOURNAL 1850 60, but was deemed "inexpedient" and was tabled—permanently. *Id.* at 225.

¹⁷ Williams v. State, 10 Ind. 503, 510 (1858) (dissent).

laid down by the court would be reversible error even where the law was correctly stated and the evidence was convincing,¹⁸ can only be answered affirmatively, as indicated above.¹⁹

Mr. Justice Gray, dissenting in *Sparf et al. v. United States*,²⁰ indicated that the guaranty of trial by jury contained in the Northwest Ordinance of 1787 included the controverted right, that its alternate denial and affirmation under the Indiana constitution of 1816 led "the people" to declare its existence through the 1851 constitution, and that "this right has since been maintained by the (Indiana) court . . ." ²¹ As to this last point, the statement is undoubtedly correct; the others seem open to doubt.

At about the time of the Indiana convention, Maryland created a similar constitutional provision. A prominent Maryland jurist has termed that provision a "constitutional thorn" which "was adopted for reasons which were groundless, to perpetuate a system which did not exist." ²² This language might be applied, with equal aptness, to the Indiana provision.

It was soon established that the new provision was to be interpreted to mean what it said. Although it was intimated in *Driskill v. State* ²³ that the jury's rights were not enlarged by the changed provision, *Williams v. State* ²⁴ subsequently definitely declared that they were, and the court observed in the case of *Dailey v. State* ²⁵ that the intimation of the *Driskill* case had been inadvertent. Since then, the general proposition that the jury is, in some measure, the judge of the law in criminal cases has not been questioned. It has, however, been limited in various ways—none of which has succeeded in making the provision a dead letter.

An important limitation pointed out in the *Dailey* case is that if the jury convicts, then on appeal the supreme court "rejudges the questions of law and fact." ²⁶ But it has been pointed out that even where a new trial is granted, the effect is simply to "require a jury to again determine the law as well as the facts, upon another trial." ²⁷

¹⁸ *Id.* at 508.

¹⁹ Cases cited in note 4 *supra*. This unfortunate result seems to be one of the most objectionable consequences of the provision. It follows from the fact that the jury is presumed to follow the instructions of the court. *Landreth v. State*, 201 Ind. 691, 171 N. E. 192 (1930).

²⁰ 156 U. S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895).

²¹ 156 U. S. 51, 153, 15 S. Ct. 273, 39 L. Ed. 343 (1895).

²² *Dennis, op. cit. supra* note 6 at 38.

²³ 7 Ind. 338 (1855).

²⁴ 10 Ind. 503 (1858).

²⁵ 10 Ind. 536, 538 (1858).

²⁶ *Ibid.*

²⁷ *McDonald v. State*, 63 Ind. 544, 546 (1878).

The granting of new trials may thus be described as merely an advisory power of the court in relation to matters of law as well as of fact.²⁸

The court still rules on questions of law in preliminary proceedings;²⁹ it determines the sufficiency of the indictment under the law and decides all questions of law arising on the admissibility of evidence.³⁰ The judge also has a statutory duty to instruct the jury as to the law applicable to the case; if he states the facts, he must also inform the jury that they are judges both of law and of fact.³¹ In giving his instructions, he is not to attempt to bind the consciences of the jurors, as seen previously.³² The line beyond which the trial judge dare not go in this connection without being reversed for infringing on the province of the jury is tenuous and shifting indeed. The supreme court ruled in one case that although the jury may determine the law for itself, it must determine it as enacted by the legislature and interpreted by the courts;³³ yet the following year it was held erroneous to instruct that the jury should not determine the law otherwise than as stated in the instructions in the absence of a "deep and confident conviction that the court is wrong."³⁴ A distinction has been drawn between the right to determine law and the right to make law, the latter being denied as indicating arbitrary disregard of the court's instructions.³⁵ It now seems settled that it is erroneous to instruct the jurors that they must weigh the instructions as they weigh the evidence, although the cases stating this rule add that great respect should be given the instructions.³⁶ It is reversible error for the trial judge, upon request of either side, to refuse to instruct the jury that they are the exclusive judges of the law and the facts,³⁷ although he

²⁸ *McCarthy v. State*, 56 Ind. 203, 205 (1877).

²⁹ *Ibid.*

³⁰ *Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711 (1885); *Bridge-water v. State*, 153 Ind. 560, 55 N. E. 737 (1899); *Harlan v. State*, 190 Ind. 322, 130 N. E. 413 (1921). *But cf.* *Hudelson v. State*, 94 Ind. 426 (1883) (distinguished in *Anderson v. State*, *supra*).

³¹ IND. STAT. ANN. § 9-1805 (Burns, 1933).

³² See note 1 *supra*.

³³ *Leseuer v. State*, 176 Ind. 448, 95 N. E. 239 (1911); followed in *Hoffa v. State*, 194 Ind. 300, 142 N. E. 653 (1923).

³⁴ *Schuster v. State*, 178 Ind. 320, 99 N. E. 422 (1912).

³⁵ *Trainer v. State*, 198 Ind. 502, 154 N. E. 273 (1926); *Leseuer v. State*, 176 Ind. 448, 456, 142 N. E. 653 (1923).

³⁶ *Hubbard v. State*, 196 Ind. 137, 147 N. E. 323 (1925); *Burris v. State*, 218 Ind. 601, 34 N. E. (2d) 928 (1941). Earlier cases *contra*: *Chesterfield v. State*, 194 Ind. 282, 141 N. E. 632 (1923); *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077 (1892); *Hinshaw v. State*, 188 Ind. 447, 124 N. E. 458 (1919). *Cf.* *Wolf v. State*, 198 Ind. 261, 151 N. E. 731 (1926) and *Lehr v. State*, 199 Ind. 280, 157 N. E. 98 (1927) (instructions adhering to earlier view disapproved but found harmless).

³⁷ *McCarthy v. State*, 56 Ind. 203 (1877).

need not disparage either the function of the instructions³⁸ or the law stated therein.³⁹ These examples indicate to some degree the difficult position of the trial judge.

It is at least within his power to instruct the jury to acquit the defendant when there is no evidence fairly tending to sustain the charge in the indictment,⁴⁰ and if a conviction by a jury is supported by no evidence whatsoever, or if there is no evidence supporting any fact essential to the conviction, the conviction is reversible error.⁴¹ Nor is the jury at liberty to create new offenses or to find the defendant guilty of an offense with which he is not charged.⁴²

In considering the limitations placed upon the jury's decision of questions of law, however, there must be born in mind the encouragement to the jury, implicit in the necessity of informing them of their constitutional right, to find according to their sentiments and prejudices rather than according to the law stated in the instructions. It is true, of course, that the power to render a general verdict enables a wrong-minded jury to overlook the law even in the absence of such a provision; but the occurrence of such an event would seem much less likely if the jury need not be told, in effect, that they may brush aside the law as stated by the court if they see fit to do so. An Illinois judge of long experience had this to say about the effects of the doctrine in that state, where it has since been abolished:⁴³

I am irresistibly led to the conclusion that jurors as the uncontrolled judges of the law possess a power which is fraught with danger and is liable to abuse, however honest may be their purpose. Ordinarily they will take the law as it comes from the court; but I call to mind among the many criminal cases tried before me during a judicial experience of twenty-five years, a number in which the jury paid no regard to the instructions given and acquitted the defendant in the face of overwhelming evidence of guilt. Sometimes the jurors do not care to understand what the law is. The attorney for the defendant, constantly parading before them that they are the judges of the law and authorized to decide the case according to their own notions, easily convinces them that it is right for them to read into the law their sympathies, their prejudices and their whims.⁴⁴

³⁸ *Bridgewater v. State*, 153 Ind. 560, 55 N.E. 737 (1899); *Eisenshank v. State*, 197 Ind. 463, 150 N. E. 365 (1926).

³⁹ *Haverstick v. State*, 196 Ind. 145, 147 N. E. 625 (1925).

⁴⁰ *State v. Banks*, 48 Ind. 197 (1874); *State v. Overholser*, 69 Ind. 144 (1879); *Trove v. State*, 1 Ind. App. 533, 27 N. E. 878 (1891); *State v. McCaffery*, 181 Ind. 200, 103 N. E. 801 (1914).

⁴¹ *Patterson v. State*, 191 Ind. 224, 132 N. E. 585 (1921); *Steinmetz v. State*, 196 Ind. 153, 147 N. E. 618 (1925).

⁴² *Thetge v. State*, 83 Ind. 126 (1882), where the jury found the defendant guilty of the impossible charge of assault and battery with intent to commit involuntary manslaughter.

⁴³ *People v. Bruner*, 343 Ill. 146, 175 N. E. 400 (1931) (statute making jury judge of law in criminal cases held unconstitutional).

⁴⁴ *Harker, The Illinois Juror in the Trial of Criminal Cases*, 5 ILL. L. REV. 468, 474 (1911).

Examination of the very numerous judicial opinions construing the doctrine discloses a general judicial inclination to limit the doctrine rather strictly, with individual differences as to the severity of limitation necessary or constitutionally permissible. Consideration of the following excerpts will perhaps indicate the general tone of the cases.

A very strict limitation of the doctrine, approved by the supreme court and followed by other trial courts since, was contained in this instruction to the jury:⁴⁵

The constitution of this state makes the jury the judges of the law as well as of the facts. But this does not mean that the jurors may willfully and arbitrarily disregard the law, nor that they may make and judge the law as they think it should be in any particular case. It means that jurors, under their oaths, should honestly, justly and impartially judge the law as it exists, and as it is found upon the statutes of our state, in each particular case. It does not mean that jurors may so judge the law in any case so as to make it null and void and of no force, but that they shall so judge the laws as to give them all a fair and honest interpretation, to the end that each and every law in each and every case may be fairly and honestly enforced . . . under your oaths you have no right to arbitrarily disregard either the law or the facts in this case, without just cause, after a fair and impartial consideration of both.

Even this instruction, replete with references to oaths and duties, clearly implies to the jury (as it must, in deference to the constitutional provision) that, after all, they may, if they think best, reject the law as stated by the court. Juries can go astray often enough without such implications.

A later case approved the following, somewhat less restrictive instructions as properly stating the proposition:⁴⁶

The jury in its deliberation may consider the constitution, the common law, the statutes, the decisions of courts of last resort, the instructions of the court and the argument of counsel, and determine the law for themselves.

This excerpt is interesting for its summary of the various sources of law available to the jury. It would seem better suited to the capacities of the jurors to remove this survey of the whole field of law involved in the case from them, and reserve it to the higher courts if appeal is taken on the ground of erroneous instructions.

⁴⁵ *Wolfe v. State*, 200 Ind. 557, 568-9, 159 N. E. 545 (1928); approved in *Brodie v. State*, 202 Ind. 40, 43, 171 N. E. 585 (1930); quoted verbatim by trial court in *Hamilton v. State*, 207 Ind. 97, 118, 190 N. E. 870 (1934).

⁴⁶ *Bryant v. State*, 205 Ind. 372, 380, 186 N. E. 322 (1933). The Supreme Court commented, "In criminal cases the jury is the judge of the law and of what facts constitute the crime. The court may advise the jury as to the law and as to what facts are entitled to consideration upon any phase of the case, but the jury has the right to determine the law, and to determine what facts will justify a conviction." *Id.* at 379.

If there is a valid reason for the continued existence of the doctrine, it is obscure indeed.⁴⁷ At least one Indiana jurist has proposed a new state constitution which would eliminate the provision and substitute therefor a flat statement that in all cases the jury "shall have only the power to determine the facts, under the advice and direction of the court."⁴⁸ Adoption of such a provision hardly seems likely in the near or foreseeable future, judging from the total lack of present-day agitation for it or for any other changes in the state constitution. However, should such an occurrence take place it would sweep away the litter of uncertainties and ill effects consequent upon the existence of the present doctrine. The state judiciary would be freed from lawful usurpation of its right to judge the law; it would be enabled to adopt the firm position of the nineteenth-century judge who, upon being requested by counsel to instruct the jury that they were judges of law as well as fact, indignantly replied, "I shan't; they ain't."⁴⁹ Such a rule would certainly be far simpler to apply than the present one, and at least as conducive to securing justice, as is evidenced by the experience of those states which never gave judicial houseroom to the doctrine and of those which once accepted it but have now rejected it or reduced it to the status of a museum-piece.

John F. Bodle

CONSTITUTIONAL LAW—BASEBALL AND THE ANTI-TRUST LAWS—A GAME OR A CONSPIRACY?—Baseball was born in a small city in New York over one hundred and ten years ago through the ingenuity of Abner Doubleday.¹ Its growth has been from an infant to a giant; from a backyard sport to the "House that Ruth built."² Its yearly attendance figures run into millions of persons. Its gross gate receipts aggregate millions of dollars, while the salaries of the better players are reaching almost awe-inspiring heights. Only recently two well-

⁴⁷ *Clem v. State*, 31 Ind. 480, 483 (1869), suggests that the provision allows the jury to exercise its "sound judgment" in determining whether the judge is worthy of trust, or whether he is "destitute of character" so that his instructions had best not be trusted. It seems doubtful whether this argument was of compelling force even at the time when it was made.

⁴⁸ H. E. Willis, *Constitution for the State of Indiana*, 19 IND. U. ALUMNI Q. 1-22 (1932).

⁴⁹ Attributed to one Judge Thompson of the United States Circuit Court in New York City, in 3 WHARTON, CRIMINAL LAW § 3269 (7th Ed. 1874).

¹ Founded in Cooperstown, New York in 1839 and is believed to have been taken from the English game of "town ball."

² The title often given to Yankee Stadium, home of the New York Yankees of the American League in New York City, due to the tremendous upsurge given baseball in the 1920's by George H. "Babe" Ruth.

known members of American League teams signed 1949 contracts for \$90,000³ and \$100,000⁴ respectively for a year, while the salaries of other greats are reaching figures close to this.⁵

This gigantic expansion has not been accomplished without its trials and tribulations, for baseball, like any other business, has had its share of misunderstandings and disputes. The great majority of these disputes have been of a private nature, unconcerned with the law or legal technicalities. Today, however, the entire organizational make-up of baseball has been brought to the attention of the courts by the highly disputed reserve clause of the players' contracts which gives each club owner an option to retain from year to year each of his players, establishing a continuing hold on the services of the player for his baseball life, or until he is traded or released. To avoid such servitude, many players have jumped to foreign leagues in the past few years.⁶ As a result of such league jumping, the players have been suspended from organized baseball in the United States and Canada for five years. After an unhappy career in foreign baseball, they have returned to this country and, having been denied readmittance to organized baseball, have brought suits against the Commissioner of Baseball and the two major leagues, charging them with entering into a conspiracy in restraint of trade.⁷ They ask treble damages as provided for in the Sherman Anti-Trust Act.⁸ In order for these players to succeed in their suits, they must prove that baseball is participating in interstate commerce and also that it is operating a conspiracy in restraint of trade within such commerce. In the only case to date on that question, *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*,⁹ the Supreme Court of the United States held that baseball as such was not a participation in interstate commerce and was outside the anti-trust laws. The issue has now arisen again and the importance of the problem prescribes a brief resumé of the history of baseball and the players' contract.

From the time of its birth in 1839 until the early 1850's, baseball was merely a backyard pastime. Teams early began to form and com-

³ Joe DiMaggio recently signed a contract calling for \$90,000 for his services during 1949.

⁴ Ted Williams of the Boston Red Sox is reported to have signed for an even \$100,000 for 1949.

⁵ Bob Feller of the Cleveland Indians received in the vicinity of \$80,000 for the 1948 season, but his salary has declined for the 1949 season partly because of the number of games Feller lost in 1948.

⁶ *Brooklyn National League Baseball Club, Inc., v. Pasquel et al.*, 66 F. Supp. 117 (E. D. Mo. 1946), 22 NOTRE DAME LAWYER 226 (1947).

⁷ *Gardella v. Chandler et al.*, ____F. (2d)____ (C. C. A. 2d 1949), 17 L.W. 2369 (U. S. Feb. 9, 1949), reversing 79 F. Supp. 260 (S. D. N. Y. 1948).

⁸ 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. § 1 *et seq.* (1946).

⁹ 259 U. S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922).

pete on a community basis and with an amateur spirit. Soon, however, certain types of subsidization began to appear in order to retain favorite players from year to year on each team. In 1869 the first all-professional team was organized in Cincinnati, Ohio, and with the later development of others, competition was soon taking place on a state and national basis. In 1876 the National Association (the present day National League) was formed for purposes of game co-ordination and uniformity of rules.

Prior to the formation of the National Association, scandal and dishonesty were rampant in the game, since it had fallen into the hands of gamblers and persons of ill repute. Much of this was eliminated with the formation of the Association, but contract breaking, team jumping by means of contract loopholes and outright steals continued on a smaller scale. The competition was especially keen among the three more prominent leagues of the time, namely, the National Association, the American Association and the Northwestern League. In 1883, these three leagues formulated and agreed to the National Agreement which laid down certain rules and regulations to be adhered to by all reputable baseball clubs that might desire benefits under its provisions, and also brought to the fore the highly disputed "reserve clause" with which we are here primarily concerned.¹⁰

Its purposes were many, but essentially to:

1. Keep teams which had been efficiently developed intact from year to year.
2. Help to make impossible the destructive practice of tempting good players, by offers of fabulous salaries, to desert cities where they had made reputations and friends.
3. Keep players' salaries within money making bounds and check the tendency among players to demand sums out of proportion to gate receipts.¹¹

1883 saw the formation of the Union Association of Professional Baseball Players and the first revolt against the reserve clause in the players' contracts. This Association, however, lasted just one year. Others were formed in later years but served to accomplish little in the way of elimination of the sources of servitude in the contracts.¹²

Through the exercise of the option in the contracts, a club may in most cases keep a player indefinitely, or until he is no longer of service to baseball. In free competition the player might well be able to better his own economic position. Such competition, however, would result in the richer clubs being able to attain control of the better

¹⁰ SPINK, *THE NATIONAL GAME* 2-6 (1910).

¹¹ *Ibid.*

¹² *Ibid.*

players and in turn monopolize control of leadership of each league, thereby enjoying a perennial benefit from the pennant and World's Series awards, financially and otherwise.

As has been mentioned previously, the legal validity of the "reserve clause" depends upon the interstate character of organized professional baseball. In attempting to establish in *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*¹³ whether organized baseball involved participation in interstate commerce, Mr. Justice Holmes said:

... the business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the Leagues must induce free persons to cross state lines, and must arrange and pay for their doing so, is not enough to change the character of the business.

Thus the Court, while conceding that "interstate commerce" includes traffic in persons and intelligence, intangibles as well as tangibles,¹⁴ nevertheless was able to conclude that professional baseball, as then conducted, was not interstate in character, since the interstate commerce involved was only "incidental to" and not "substantially" a part of the business. As the question has been phrased:¹⁵

Without attaching to a particular activity (here baseball) the label of commerce, is it so much a part of another activity which is unquestionably interstate commerce (transportation across state lines for instance) as to be interstate commerce itself?

There has been much conflict about and little clarification of what is "incidental to" and what is "substantially" participation in interstate commerce.¹⁶ The history of the commerce clause has shown a trend from a narrow to a broad interpretation, and a heavy burden is upon him who asserts that the plenary power which the commerce clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate a particular trade to the same extent that it includes the power to regulate other trades or businesses conducted across state lines.¹⁷ In 1942 the Court, in con-

¹³ 259 U. S. 200, 208-209, 42 S.Ct. 465, 66 L.Ed. 898 (1922).

¹⁴ See *Jordan v. K. Tashiro*, 278 U. S. 123, 127, 128, 49 S.Ct. 47, 73 L.Ed. 214 (1928); *Champion v. Ames* (Lottery Case), 188 U. S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L.Ed. 708 (1878); *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, 229, 230, 6 L.Ed. 23 (1824).

¹⁵ 16 FORD. L. REV. 208 (1947).

¹⁶ See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466, 467, 58 S.Ct. 656, 82 L.Ed. 954 (1938); *Northern Securities Co. v. United States*, 193 U. S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904).

¹⁷ See *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 25 (1824); *HAMILTON & ADAIR, THE POWER TO GOVERN* 53-63 (1937).

struing the second Agricultural Adjustment Act, saw fit to declare that trading in wheat on a local basis would have such an effect on national wheat trading as to be considered interstate commerce even though the wheat was for local consumption.¹⁸ In *United States v. American Medical Association*,¹⁹ the United States Court of Appeals for the District of Columbia reversed a lower court judgment sustaining a demurrer to an indictment for conspiracy in restraint of trade, in violation of Section 3 of the Sherman Act.²⁰ The indictment charged that the American Medical Association had conspired to destroy the business and activities of Group Health Association, Inc., a cooperative non-profit association, organized for group medical practice on a risk-sharing basis. The court of appeals, proceeding on the broad theory that any contract unenforceable at common law because of being in restraint of trade was within the prohibition of the anti-trust laws, held that in so far as Section 3 of the Sherman Act was concerned, the practice of medicine was trade.

In 1944 the Supreme Court of the United States handed down what was probably one of the most far reaching decisions of the past decade in *United States v. South-Eastern Underwriters Association et al.*,²¹ declaring insurance to be interstate commerce and subject to the anti-trust laws. Prior to this decision, insurance had stood outside the range of the Sherman Act, for in *Paul v. Virginia*²² the Court had taken the view that the business of insurance was not interstate in character. In another case concerned with transportation prior to the actual participation in interstate commerce, *Hooper v. California*,²³ the Supreme Court held that such transportation was merely incidental to, and not substantially an activity within interstate commerce, relying on the decision handed down in *Paul v. Virginia*. In deciding the *Federal Baseball* case, Mr. Justice Holmes based his opinion on the *Hooper* case which in turn was based upon *Paul v. Virginia*, on the ground that the facts brought forth an activity incidental to interstate commerce. Now, that which in *Paul v. Virginia* (insurance) had merely been *incidental* to interstate commerce, has now become *substantially* interstate commerce in the *South-Eastern Underwriters* case. The precedent for the *Hooper* case having been removed, doubt is certainly cast on the continued validity of that case, upon which the decision in the *Federal Baseball* case is based.

¹⁸ Wickard v. Filburn, 317 U. S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

¹⁹ 110 F. (2d) 703 (App. D. C. 1940), cert. denied, 310 U. S. 644, 60 S.Ct. 1096, 84 L.Ed. 1411 (1940).

²⁰ 26 STAT. 209 (1890), 15 U. S. C. § 3 (1946).

²¹ 322 U. S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

²² 8 Wall. 168, 183, 19 L.Ed. 357 (1869).

²³ 155 U. S. 648, 655, 15 S.Ct. 207, 39 L.Ed. 297 (1895).

Very recently, the Supreme Court held in *Mandeville Island Farms Co. v. Crystal Sugar Co.*,²⁴ that price fixing between refining companies competing in interstate commerce was a conspiracy in restraint of trade. There the competing companies established uniform prices to be paid to growers of sugar who merely operated on an intrastate basis. Thus we are confronted with another legal paradox, for in the *Hooper* and *Paul* cases the Court said that that which is merely incidental to interstate commerce is not to be considered interstate commerce. Now in 1944 in the *Southern Underwriters* case and in 1948 in the *Mandeville Island Farms Co.* case, that which was heretofore merely antecedent to or incidental to interstate commerce has become substantially interstate commerce. This metamorphosis may perhaps give us a clue as to the future of baseball as a closed organization and its relevance to the judicial trend of the day.

In considering the case of *Gardella v. Chandler et al.*,²⁵ Judge Learned Hand chose to avoid the "reserve clause" element of the dispute and placed his holding mainly on the lucrative radio and television contracts which the ball clubs have made. Under these contracts, the clubs furnish the spectacle, giving the radio companies leave to enter and broadcast the game. The players, radio, television, clubs in general and the public make up an indivisible unit as much as actors and spectators in a theater, and are participating in interstate commerce. As the court viewed the facts, the interstate character of the game is the same as if a state line ran between the field and the stands. Turning then to the option in players' contracts Judge Hand says: ²⁶

I do not think that at this stage of the action we should pass upon the "reserve clause"; and therefore I do not join in my brother Frank's present disposition of it, although I do not mean to dissent from him. All that I wish now to decide is that the complaint avers enough to present an issue upon a trial.

Thus one of our most eminent jurists has chosen to avoid for the present the validity of the "reserve clause" until such a time as baseball has been declared to be participating in interstate commerce, for until that point is decided it remains a secondary question insofar as it concerns the *Gardella* case. If it is decided that baseball is participating in interstate commerce, then, of course, the validity of the reserve clause will be a major factor in determining the existence of a conspiracy in restraint of trade. The commerce question will decide the application or non-application of the Sherman Anti-Trust Act, and the construction of the reserve clause will determine the existence of a monopoly or at least a combination in restraint of trade. There was

²⁴ 334 U. S. 219, 68 S.Ct. 996 (1948).

²⁵F. (2d).... (C. C. A. 2d 1949), 17 L.W. 2369 (U. S. Feb. 9, 1949).

²⁶ *Ibid.*

dictum to that effect (monopoly) in *American League Baseball Club of Chicago v. Chase*,²⁷ in which case the court, in refusing specifically to enforce affirmatively or negatively a reserve clause, stated:

"Organized baseball" is now as complete a monopoly of the baseball business for profit as any monopoly can be made. It is in contravention of the common law, in that it invades the right to labor as a property right, in that it invades the right to contract as a property right, and in that it is a combination to restrain and control the exercise of a profession or calling. . . .

And further: ²⁸

The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States. . . .

That a monopoly exists seems obvious. That baseball is participating in interstate commerce seems equally undeniable.

In a bold separate opinion in the *Gardella* case, Judge Frank virtually takes the bull by the horns and goes immediately to the judicial antiquity of the *Federal Baseball* case in comparing it with the case at hand: ²⁹

No one can treat as frivolous the argument that the Supreme Court's recent decisions have completely destroyed the vitality of [the] Federal Baseball Club [decision] . . . and have left the case an impotent zombi. Nevertheless it seems best that this court should not so hold.

However much one may believe that stare decisis bogs down our jurisprudence in a mire of stagnant precedents, the above statement of the court should serve to convince that adherence to decisions of the past is a necessity, but not a duty. To have a degree of certainty and continuity in the law, there must be some sequence and adherence, but there must also be a degree of elasticity to meet changing circumstances. Judge Frank points this out in his opinion by stating that even though the impotency of the *Federal Baseball* case is obvious, that point is for the higher court to decide.

Considering the reserve clause, he looks at the almost perpetual servitude involved in that clause, and at once finds it repugnant to moral principles that have been basic in America at least since the Civil War: ³⁰ " . . . I may add that, if the players be regarded as quasi-peons it is of no moment that they are well paid, only the totalitarian minded will believe that high pay excuses virtual slavery." He then points out, along with Judge Hand, that the present case may be distinguished from the *Federal Baseball* case on the grounds that here baseball clubs have involved themselves with radio and television

²⁷ 86 Misc. 441, 149 N. Y. S. 6, 17 (1914).

²⁸ *Id.* at 19.

²⁹F. (2d).... (C. C. A. 2d 1949), 17 L.W. 2369 (U. S. Feb. 9, 1949).

³⁰ *Ibid.*

broadcasts along with the telegraph, forming an almost indivisible unit, which appears to be not only incidental to interstate commerce, but substantially partaking of it.

The court concludes that two questions remain to be answered. (1) May Congress constitutionally regulate the interstate portion of such a business as that done by organized baseball? (2) If so, has Congress in the Sherman Act sufficiently exercised its constitutional power to include that portion of the business?

In the light of what has been heretofore stated it should be pointed out that, despite all other circumstances, the really important question insofar as it concerns baseball on the whole is the validity of the reserve clause. Whether baseball is interstate commerce or not is of concern primarily to the government and the legal profession. Whether baseball shall continue on its present prominent basis is of concern to the American people in general. The conclusion seems unavoidable that enforcement of the clause constitutes a combination in restraint of trade. At first glance, it has all the appearances of a rather insignificant part of an integrated contract, but its ultimate effect in the circle from the player to the club to the Commissioner and thence back to the player is most important. It is merely an express covenant prohibiting an employee from offering or selling his services to another employer and confining him to the present employer for the length of the contract, with an additional provision for renewal, but inclusion of this clause in all baseball contracts as a part of a common plan has resulted in virtual monopolization of professional baseball talent.

While affirmative enforcement of the clause is, of course, impossible, since the contract is one for personal services,³¹ the well-known exception³² in regard to equitable enforcement of negative covenants has been applied, since the inadequacy of damages because of the unique character of a baseball player's services is in most cases easily shown.³³ Enforcement of a typical baseball contract was refused in *American League Baseball Club of Chicago v. Chase*,³⁴ however, because the clause permitting the employing club to cancel the contract on ten days' notice was felt to deny mutuality of remedy. As was stated there:

The plaintiff can terminate the contract at any time on 10 days' notice. . . . The player's contract . . . binds him, not only for the playing season . . . but also for another season, if the plaintiff chooses to exer-

³¹ Rutland Marble Co. v. Ripley et al., 10 Wall. 339, 19 L.Ed. 955 (1870).

³² Lumley v. Wagner, 1 De Gex., M. & G. 604, 42 Eng. Rep. 687 (1852).

³³ Philadelphia Ball Club, Ltd., v. Lajoie et al., 202 Pa. 247, 51 Atl. 973 (1902); Spencer v. Milton, 159 Misc. 793, 287 N. Y. S. (2d) 944 (1936) (unique character of services held not proved).

³⁴ 86 Misc. 441, 149 N. Y. S. 6, 14 (1914). *Accord*, Weegham v. Killefer et al., 215 Fed. 168 (W. D. Mich. 1914); Brooklyn Baseball Club v. McGuire, 116 Fed. 782 (C. C. E. D. Pa. 1902); Baseball Club v. Barrett, 14 Fed. 257 (C. C. W. D. Pa. 1882).

cise its option, and if it insists upon the requirement of an option clause in each succeeding contract, the defendant can be held for a term of years. His only alternative is to abandon his vocation. Can it fairly be stated that there is mutuality in such a contract?

As has been mentioned previously, the court also did not allow the question of the existence of a combination in restraint of trade through use of the reserve clause to go unnoticed:³⁵

If a baseball player like the defendant, who has made baseball playing his profession and means of earning a livelihood, desires to be employed at the work for which he is qualified and is entitled to earn his best compensation, he must submit to dominion over his personal freedom and the control of his services by sale, transfer, or exchange without his consent, or abandon his vocation and seek employment at some other kind of labor. While the services of these baseball players are ostensibly secured by voluntary contracts a study of the system as hereinabove set forth, and as practiced under the plan of the National Agreement, reveals the involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country.

Each player is thus bound almost inseparably to either his original team or a purchaser of his contract if he is to remain in baseball.³⁶ Each team is bound by the rules of organized baseball as administered by the Commissioner.³⁷ All of these elements, in addition to the lucrative radio, television and telegraph contracts, have, it seems, given the circuit court of appeals sufficient grounds for their decision in the *Gardella* case, insofar as they are related to the composition of a conspiracy in restraint of trade.

The cases cited not only tend to prove the invalidity of the reserve clause, but also verify the contention of the suspended player concerning the monopolistic character of baseball as a whole. Unless a player is given an outright release by the team holding his contract, he is confronted with a virtual boycott on the part of the remaining teams, since they are bound to refrain from signing him while another team holds an option to his contract under the National Agreement. The answer to the question, whether Congress in the Sherman Act intended to cover such activities as those of baseball, may perhaps be found in the view of interstate commerce taken by Mr. Justice Black in the *South-Eastern Underwriters* case:³⁸

³⁵ 86 Misc. 441, 149 N. Y. S. 6, 19 (1914).

³⁶ "This contract may be assigned by Club, and player shall report to the assigned club promptly (as provided in the Regulations) upon notice of such assignment. Upon and after such assignment, all rights and obligations of the assignor hereunder shall become and be rights and obligations of the assignee and the assignee shall become liable to the Player for his salary and the assignor shall not be liable therefor. All references in this contract to Club shall be deemed to mean and include any assignee of this contract."

³⁷ National Agreement of Professional Baseball Clubs.

³⁸ 322 U. S. 533, 550-551, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), quoting Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 190, 6 L.Ed. 23 (1824).

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It described the commercial intercourse between nations, and parts of nations, in all its branches . . ." Commerce is interstate, he said [Chief Justice Marshall], when it "concerns more States than one . . ." No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the States.

It is submitted that the circuit court of appeals, in determining that the facts might prove the interstate character of baseball, was in accord with this comprehensive view of the extent of the commerce clause, as well as with the many other decisions that have recognized the existence of this broad congressional power in the past.³⁹

Suits similar to the *Gardella* case are at the present time being filed by other players suspended from organized baseball for league jumping, who claim well over \$2,000,000 damages from such leagues.⁴⁰ Their contention, like *Gardella's*, is that they have been deprived of the right to pursue a legitimate vocation or field, through baseball's use of the reserve clause. The distinction between the *Gardella* case and the suits now being brought is that *Gardella* was not a contract jumper. That is, he was not under an actual contract at the time he accepted a position with the Mexican league, whereas in the new suit being brought, the players were under contract for the year and disregarded this contract to go to the Mexican league.⁴¹ *Gardella* had completed the services called for in his contract, but was still subject to the reserve clause or option to retain in the contract. In response to the court of appeals' statement that the clause involves virtual peonage, Commissioner Chandler's attitude was that no major league ball player makes less than \$5,000 a year, and some make up to \$100,000. Further, he stated that "if that is peonage a lot of us would like to have it." *Gardella* contends that his salary ranged from \$1,850 to \$4,000 a year.⁴² With reference to the statements of Commissioner Chandler and major league salaries, it is to be remembered that the closed organizational make-up of baseball concerns not only the major leagues, but also the minor leagues. Many of these minor league players are paid as little as \$500 a year, and are still bound by this same reserve clause, and the code of the Commissioner.⁴³

³⁹ Note 14 *supra*.

⁴⁰ See N. Y. Times, March 11, 1949, p. 37, col. 1. Baseball has been ordered by the federal court in the case of *Max Lanier and Martin v. Commissioner* to show cause by March 14, 1949 why the "reserve clause" should not be suspended pending the outcome of the present litigation.

⁴¹ *Ibid.*

⁴² Time, February 21, 1949, p. 63. Commissioner Chandler is paid \$50,000 a year for his services as commissioner of organized baseball.

⁴³ Major-Minor League Rules and Agreement.

In conclusion, it is important to note that in considering the cases cited there has been one note of consistency followed by the Supreme Court; that is, whether federal or state legislation has been applied in the particular field being litigated.⁴⁴ In the case of baseball we have practically neither, with the possible exception of Sunday laws in some of the states. In the majority of cases involving an activity within interstate commerce and the application of the Sherman Act, the Supreme Court has primarily dealt with industry and material objects of trade, while in the case of baseball, we are concerned with a personal service contract, and its bearing on such commerce. Of course this fact by no means betters the position of baseball in the eyes of the Court, but will undoubtedly make it more tenuous. After the decision on the *South-Eastern Underwriters* case declaring insurance to be interstate commerce, Congress immediately exempted that business from federal control,⁴⁵ provided that insurance was covered by state law. A similar exemption could be provided by Congress in favor of organized baseball, but it would not be necessary to make such exemption contingent upon the exercise of state control. Baseball, like insurance, is undoubtedly a business affected with a strong local interest. Such exemption, however, would seem a most dangerous move; for, after disarming the villain, must we hand him back his whip? Such a consummation is hardly devoutly to be wished.

In deciding the status (and perhaps fate) of baseball, the Supreme Court may very well apply the "rule of reasonableness" in construing the Sherman Act and its applicability as laid down in *Appalachian Coals, Inc., v. United States*,⁴⁶ with regard to what Congress intended to do in the Sherman Act; whether it intended to cover baseball. However remote such a possibility may seem, it must not be overlooked; even members of the Supreme Court go to the ball game.

Nevertheless, an analysis of the foregoing makes it appear likely that not only will the Supreme Court rule that baseball, as such, is an activity within interstate commerce, but will in addition declare the reserve clause invalid. In all probability, this decision will be followed by congressional action exempting baseball from the anti-trust laws as to players' contracts, reaching an effect roughly analogous to what was done with insurance. The dignity of man and of his services certainly raises him above the level of a mere insurance policy; that he should not be left to the despotic benevolence of these magnates of the mound, to be declared anathema in his vocation, is self-evident.

⁴⁴ *Anderson et al. v. United States*, 171 U. S. 604, 19 S.Ct. 50, 43 L.Ed. 300 (1898); *Hopkins et al. v. United States*, 171 U. S. 578, 19 S.Ct. 40, 43 L.Ed. 290 (1898); *United States v. E. C. Knight et al.*, 156 U. S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895).

⁴⁵ 59 STAT. 33 (1945), 15 U. S. C. § 1011 (1946).

⁴⁶ 288 U. S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933).

Many are the suggested answers, but few the solutions to this complex problem. Baseball has functioned successfully for many years but this success does not justify the servitude imposed by the "reserve clause," for even as Judge Frank has stated in the *Gardella* case, "that would be acceptable only to the totalitarian minded." Baseball may well argue the point that public utilities have been permitted to operate as a monopoly since they are for the common good of the people, but is this not confusing that which is *necessary* with that which is *incidental* to the common good, or in short a necessity with a luxury? Baseball is a tradition in America; such a tradition should not be based on the sophistic premise that baseball cannot continue to function without the reserve clause, for who can truthfully make such a categorical statement at this time? If this be a swan-song, baseball has written the theme, *Gardella* has added the score, and unless a solution is found, it may well be entitled "*Après Moi la Deluge*" instead of "Take Me Out to the Ball Game."⁴⁷

Edward G. Coleman

TORTS—THE RIGHT OF PRIVACY—ARTICLES, BOOKS, PHOTOGRAPHS, AND FILMS—THE SCOPE OF THE RIGHT.—In the more than half a century which has now elapsed since the publication of the celebrated and much-discussed Brandeis-Warren article on the right of privacy,¹ no field of tort law has received so much comment from legal commentators. Slowly, but with a growing avalanche of favorable decisions,² the various jurisdictions to which the problem has been presented have accepted the existence of this right. There have been a few exceptions.³ The scope of this note includes only incidentally the

⁴⁷ The decision to be handed down in the *Gardella* case will in all probability affect other sports such as professional football, hockey, or other organized fields as much as it will affect baseball.

*On April 1, 1949, Federal Judge Edward A. Conger of the District Court of New York rejected the request of Lanier and Martin, former Cardinals, for an injunction reinstating them to organized baseball, on the ground that a trial "must be had to determine the legal and factual issues involved." See Chicago Sun-Times, April 2, 1949, p. 47, col. 4.

¹ Brandeis and Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For some interesting background to this article, see A. T. MASON, *BRANDEIS, A FREE MAN'S LIFE* 70 (1946).

² See Part II, *post*.

³ Rhode Island: *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97 (1909); Wisconsin: *See Judevine v. Benzies-Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295 (1936). Possibly Massachusetts, see note 54, *post*.; Minnesota, where the question was expressly reserved in *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (Minn. 1948); and Washington, where the latest case,

various alternative theories upon which relief has been granted in lieu of an express recognition of a common law⁴ or constitutional⁵ right of privacy, or a statute on the subject, but it is well to set out *in limine* that the states which grant relief upon the theories of the invasion of a property right, defamation, the breach of an express or implied contract or trust, or upon some other already recognized ground of relief will not be considered here. The discussion in this note will be centered around the problem, which is perhaps best stated thus: How far does the right of privacy extend in regard to articles and photographs appearing in newspapers and magazines, books in which a person is chronicled or discussed, and motion pictures or newsreels in which he or his activities appear? More specifically, our problem is to consider the possible right to recover when what is generally understood as a "non-commercial" use has been made of the photograph, name, biography, activity, or personality of a person.

Courts have certainly not been in accord concerning the basis or rationale of the right of privacy, nor the interests which it protects. Such a state of the law is not surprising, since any recognition at all has come, at least in large part, within the past sixty years. It was indicated above that some courts have been reluctant to extend the right beyond the protection of a property interest; where a trust or contract, express or implied, can be found; or where the law of defamation can be stretched to fit the situation. Other jurisdictions, perhaps unwilling to fit square pegs into round holes, have embraced the Brandeis-Warren theory in varying degrees. Among these are Georgia,⁷ Kentucky,⁸ Oregon,⁹ and lately, Arizona.¹⁰ These courts have held that the right of privacy is a natural right, independent of other rights for the breach of which a legal action may be maintained. Other courts, including those of New York under the narrow interpretation given to the Civil Rights Law, have sought to restrict the right to cases clearly falling within the general denomination of advertising or "purposes of trade."¹¹ The latest court to accept the right of privacy, the Supreme Court of Michigan, probably restricts it to

Lewis et ux. v. Physicians and Dentists Credit Bureau, Inc.,Wash....., 177 P. (2d) 896 (1947), also expressly reserves the question. It is ventured, however, that these last two states will accept the right—the later decisions are not unfavorable.

⁴ See Part I, *post*.

⁵ See Part II, *post*.

⁶ See Part III, *post*.

⁷ Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).

⁸ Foster Milburn Co. v. Chinn, 134 Ky. 424, 120 S.W. 364 (1909); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Jones v. Herald Post Co., 230 Ky. 227, 18 S.W. (2d) 972 (1929).

⁹ Hinsh v. Meier & F. Co.,Ore....., 113 P. (2d) 438 (1941).

¹⁰ Reed v. Real Detective Publ. Co.,Ariz....., 162 P. (2d) 133 (1945).

¹¹ See Part I, *post*.

similar situations.¹² Still others, such as California, Missouri, and at least in part of New Jersey,¹³ have found in the constitutional provisions of the states the essential basis and rationale of the right.

This discussion will be divided into three sections: first, the right to relief in New York under the statute; second, in the jurisdictions where the right of privacy is acknowledged to exist at common law; and third, where it is said to be protected by a constitution.

I. *Under the Statute in New York.*

Actually, New York is not the only jurisdiction which has given the right of privacy a limited statutory protection and recognition. Utah has a statute, set forth in part in the note,¹⁴ which does not seem to have received judicial interpretation. Since, however, its wording is substantially similar to that of the New York law, it may be fairly supposed that a like construction would be given to the Utah statute in a case presented to the Utah court.

After the famous *Roberson v. Rochester Folding Box Co.* decision,¹⁵ which was followed by a torrent of criticism directed toward the holding that the right of privacy did not exist at common law, the legislature forthwith passed a statute¹⁶ designed to cover situations of the *Roberson* type. The statute expresses in terms the legislative intent to cover the unauthorized appropriation of the name, photo-

¹² *Pallas v. Crowley, Milner & Co.*,Mich....., 33 N.W. (2d) 911 (1948).

¹³ See *McGovern v. VanRiper*, 140 N. J. Eq. 341, 54 A. (2d) 469 (1947), acknowledging the right but apparently limiting it, reversing *McGovern v. Van Riper*, 137 N. J. Eq. 24, 43 A. (2d) 514 (1945) in a "rogue's gallery" case. See 23 NOTRE DAME LAWYER 380 (1948).

¹⁴ REV. STAT. UTAH ANN., Penal Code §§ 103-4-7, 103-4-10 (1933). §§ 103-4-8 and 103-4-10 are penal. The provisions of § 103-4-9, which is remedial, follow: "Any living person, or the heirs or personal representatives of any deceased person, whose name, portrait, or picture is used within this state for advertising purposes or for purposes of trade, without the written consent as provided . . . may maintain an action against such person so using his name, picture, or portrait to prevent and restrain the use thereof; and may in the same action recover damages for any such use, and, if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is declared to be unlawful, the jury or court . . . in its discretion, may award exemplary damages." Note the provisions for punitive damages and the provisions for action in the heirs of personal representatives. The last provision is absent from the New York statute and seems contra to the general rule. The penal section of the statute extends the right of privacy to public institutions and official titles of any public officer of the state, and to the great seal of the state. §§ 103-4-7, 103-4-10.

¹⁵ 171 N. Y. 538, 64 N.E. 442 (1902).

¹⁶ N. Y. CIVIL RIGHTS LAW §§ 50, 51 (McKinley). The statute, in addition to providing that the breach of the right of privacy as there defined shall constitute a misdemeanor, provides for both equitable and legal relief in the form of an injunction and damages, with a provision for exemplary damages. The nature of the relief will not be discussed in this note save incidentally, but it is acknowledged that a division of opinion exists.

graph, or portrait of another for advertising of purposes of trade. Whether or not the statute goes any further is a point of inquiry here.

It is perhaps fair to state that the statute does not, indeed, go very much further. The extent of its protection depends upon the interpretation of the words "trade purposes," for there has not been much controversy over what constitutes "advertising." A few general rules, gleaned from decisions which will be discussed with more particularity below, follow.

1. "Trade purposes" does not include
 - a. current news, theoretically a matter of legitimate public discussion.
 - b. educational feature material, which is given a liberal meaning.
 - c. *authentic* pictures, newsreels, biographies, or activities of a person, particularly one who is a public character.
2. "Trade purposes" does, in isolated instances, include certain quasi commercial uses, such as photographs of plaintiff in a risqué setting in a highly sensational magazine,¹⁷ or x-rays of the plaintiff's interior.¹⁸
3. "Trade purposes" does include fictionalized biographies, or accounts of activities,¹⁹ fictionalized films, and cartoons and caricatures, even though not necessarily libelous.²⁰

The New York statute has been held constitutional.²¹ It has been said that, while the penal section of the statute should receive a strict construction, that portion which is remedial should be liberally construed.²² The cases do not bear out the latter part of that statement.

It is not contended that the statute should extend so far as to protect persons from having their names or photographs disseminated in really legitimate news stories. When one makes news, he is said

¹⁷ *Selmer v. Ultem Publications, Inc. et al.*, 170 Misc. 551, 9 N. Y. S. (2d) 319 (1938).

¹⁸ *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S. D. N. Y. 1939). This case involved x-ray pictures of plaintiff's abdomen, which then contained a steel surgical clamp. The court decided that the trial must determine where the alleged breach of privacy first occurred, since the law of the place of wrong controlled.

¹⁹ *Binns v. Vitagraph Corp. of America*, 210 N. Y. 51, 103 N.E. 1108 (1913); *Krieger v. Popular Pub., Inc. et al.*, 167 Misc. 5, 3 N. Y. S. (2d) 480 (1938).

²⁰ *Molony v. Boy Comics, Inc. et al.*, 65 N. Y. S. (2d) 173 (1946). See also, *McNulty v. Press Pub. Co. et al.*, 136 Misc. 833, 241 N. Y. S. 29 (1930).

²¹ *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N.E. 1097 (1908), *aff'd* 220 U. S. 502, 31 S.Ct. 490, 55 L.Ed. 561 (1911).

²² *Jackson v. Consumer Pub., Inc.*, 169 Misc. 1022, 10 N. Y. S. (2d) 691 (1939); *Sarat Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. S. 382 (1937). *But see* *Wilson v. Brown*, 189 Misc. 79, 73 N. Y. S. (2d) 587, 589, 590 (1947).

to waive his right of privacy, just as he does when he steps out of private life by running for office, becoming an actor, author, or painter, or a similar public character. What may constitute legitimate news is subject to debate, and that subject will be discussed in greater detail below.

A typical New York case which denied relief is *Sarat Lahiri v. Daily Mirror, Inc.*²³ There, the plaintiff, a famous Hindu musician, was depicted by defendant's magazine section playing an accompaniment to an Indian female dancer in conjunction with an article on the fabled "Indian rope trick." The court, after an excellent and detailed discussion of the right of privacy in New York, denied recovery to the plaintiff because, in the words of the court,²⁴

. . . The public policy involved in leaving unhampered the channels for the circulation of news information is considered of primary importance, subject always, of course, to the common law right of redress for libel.

The defendant's article was held to be an educational feature, and therefore not within the purposes of trade contemplated by the statute. Nevertheless, the court in a dictum²⁵ disapproved earlier expressions to the effect that newspapers, outside their advertising columns, were totally exempt from the statute.²⁶

Another and more striking illustration of the same point is found in *Colyer v. Fox*.²⁷ There recovery was denied when the photograph of the plaintiff, a female high diver, was printed in the *Police Gazette* in company with four persons described by the court as "woman vaudeville performers." The picture was accompanied by the words, "Five of a kind on this page. Most of them adorn the burlesque stage; all are favorites with the bald-headed boys." The court held that the picture and comment were not printed for trade purposes.

In *Martin v. New Metropolitan Fiction*,²⁸ the issue presented was whether the publication of a news story, accompanied by a photograph and alleged remarks of plaintiff concerning the murder trial in which she was incidentally and unwillingly involved, invaded the right of privacy because such use was for trade purposes. In the original opinion,²⁹ the court held that the use of the picture and the remark constituted such an invasion. In the opinion, the court said:

From the standpoint of the readers of the magazine, the conclusion would be, ordinarily, that the picture of plaintiff with its accompanying

²³ 167 Misc. 766, 295 N. Y. S. 382 (1937).

²⁴ *Id.* at 388 of 295 N. Y. S.

²⁵ *Id.* at 388 of 295 N. Y. S.

²⁶ *Moser v. Press Pub. Co.*, 59 Misc. 78, 109 N. Y. S. 963 (1908); *McNulty v. Press Pub. Co. et al.*, 136 Misc. 833, 241 N. Y. S. 29 (1930).

²⁷ 162 App. Div. 297, 146 N. Y. S. 999 (1914).

²⁸ 139 Misc. 290, 248 N. Y. S. 359 (1931), *reversed after retrial mem.*, 260 N. Y. S. 972 (1932).

²⁹ 139 Misc. 290, 248 N. Y. S. 359 (1931).

lurid and passionate quotation attributed to her was inserted simply to add to the sale of the publication. Such a use I do not believe to be a legitimate, but rather a commercial one.

However, upon a subsequent appeal of the case after a retrial, the original opinion was reversed³⁰ on the authority of *Binns v. Vitagraph Co. of America*.³¹

The effect of the public character doctrine³² in New York is not clear. In the recent case of *Koussevitsky v. Allen, Towne, and Heath, Inc., et al.*,³³ the prominent conductor of the Boston Symphony was the subject of a biography for which permission had been expressly refused. The work was further embellished with apocrypha, and contained intermingled praise and deprecation. Despite the elements of what might be called fictionalization, the court held that Koussevitsky could not recover. The holding was on the ground that the conductor was a public character. Therefore, the public had a right to know both his history and his characteristics. The court further said that the work must be fictional or "non-public" in character to meet the statutory meaning of trade purposes. The case of *Sidis v. F. R. Pub. Co.*,³⁴ decided by a New York federal court and affirmed by the Court of Appeals for the Second Circuit, will be discussed in Part II of this note. It involved the law of several states other than New York, as well as that of New York.

It was indicated above that the real value of the public character rule in New York is questionable. It is certainly germane to decisions in other states where, but for the privilege of reporting the activities of a public character, the use of a photograph or story would invade the right of privacy. In New York, the right seems so restricted to advertising and narrowly defined trade uses that it seems unlikely that relief would be granted in the absence of fictionalization, no matter how obscure the plaintiff. Possibly, in the light of the *Selmer* case³⁵ gross trade drumming with provocative photographs might win relief for an obscure plaintiff where similar relief would not be available to a public character. The public character doctrine, moreover, may mean only that, where there has been a slight fictionalization or embellishment of the *Koussevitsky* type, relief will not be granted as readily to a public character as it would be in the case of a purely private individual.

³⁰ 260 N. Y. S. 972 (1932).

³¹ 210 N. Y. 51, 103 N.E. 1108 (1913). See also, *Krieger v. Popular Publications, Inc. et al.*, 167 Misc. 5, 3 N. Y. S. (2d) 480 (1938).

³² See PROSSER ON TORTS 1061 (1941).

³³ 188 Misc. 479, 68 N. Y. S. (2d) 779 (1947), *aff'd*, 272 App. Div. 759, 69 N. Y. S. (2d) 432 (1947).

³⁴ 34 F. Supp. 19 (S. D. N. Y. 1938), *aff'd*, 113 F. (2d) 806 (C. C. A. 2d 1940).

³⁵ See note 17 *supra*.

It has been said above that cases interpreting a quasi-commercial use as a trade use are rare. There are, however, certain cases in which relief has been granted. All were very exceptional situations, where collateral circumstances affected the decision, or where the use was in a medium definitely not educational. A case falling within the first of these two classes is *Selmer v. Ultem Publications*.⁸⁶ There, a photograph of the plaintiff, a young woman legally an infant, was exhibited in defendant's magazine, on the same page with risqué matter. Although the picture did not appear in advertising, the pornographic nature of the publication and the location of the picture influenced the court, which held that the use was for trade purposes. The difference between the *Selmer* and *Colyer*⁸⁷ cases is at best obscure, and illustrates nothing more than a difference in degree. The *Selmer* case was decided twenty-two years after the *Colyer* case, and was decided by a county supreme court. No logical argument can be made for an essential difference between the two cases. Perhaps the *Selmer* case may yet appear as the peg upon which hang more liberal decisions.

The "non-educational" rule mentioned above seems to extend only to comic books and cartoons, unless cases of the *Selmer* type fall within it. The two types of cases probably have roots in the same essential proposition. An example of the comic book case is *Molony v. Boy Comics, Inc. et al.*,⁸⁸ where a portrayal of plaintiff in a comic book was held to violate the statute, where the comic books were distributed for profit. The court added that the rule applied even though the cartoons depicted an event of some public interest. It was held that such a portrayal is to be differentiated from newspaper and magazine articles of an educational nature. Perhaps this distinction is weak. A comic book could be as authentic as an ordinary book or feature article, and furthermore, it could in certain circumstances be equally educational. The court in the *Molony* case leaned in the right direction, but with rather specious reasoning. Even conceding that the comic book was in no way educational, one would have to be blessed with extraordinary powers of perception to discover educational value in the *Police Gazette*. If the non-educational test were applied to many feature stories which dwell overmuch upon the sensational, the right of privacy in New York would indeed be afforded much greater protection.

It seems settled law that relief will be granted where the plaintiff's activities are fictionalized. Perhaps, in the light of the *Koussevitsky* case discussed above, the statement should be qualified by adding *substantially* before "fictionalized" where the plaintiff is a public char-

⁸⁶ 170 Misc. 551, 9 N. Y. S. (2d) 319 (1938).

⁸⁷ See note 27 *supra*.

⁸⁸ 65 N. Y. S. (2d) 173 (1946). See also, *McNulty v. Press Pub. Co. et al.*, 136 Misc. 833, 241 N. Y. S. 29 (1930).

acter. An illustration of the general rule may be found in *Binns v. Vitagraph Co. of America*.³⁹ There, the Court of Appeals of New York held that where the plaintiff, who had participated in a dramatic rescue at sea, had been impersonated and his adventures acted out in the defendant's motion picture, there was an invasion of the right of privacy because the use was for purposes of trade. The incident had been fictionalized.

It has been held that a "word portrait" of the plaintiff was not within the statute when he alleged that his activities had been fictionalized in a novel, but there the plaintiff was not referred to by name.⁴⁰ An anomalous motion picture case is *Feeney v. Young*.⁴¹ There, the plaintiff, who was to undergo a Caesarian operation, orally gave consent for motion pictures to be made of the operation. The pictures were to be used only for exhibition to doctors and medical societies. Later, they were exhibited in two large theaters in New York City as part of a film called "Birth." The plaintiff brought an action under the privacy statute. The case was decided on the evidential value of the pictures to show that they represented the plaintiff, and they were held admissible. The court said that the pictures were for "purposes of trade." It is to be observed that no allegations of fictionalization were made, but it also should be noted that there was the breach of an express contract. This latter fact probably proves that the case does not extend the scope of the right in New York, even conceding that a difference can be spelled out between motion pictures in the ordinary sense and newsreels of current events.⁴² The breach of contract should have allowed relief to the plaintiff even in the absence of any statute.

The general rule still seems to be that, where the story of the plaintiff is true,⁴³ no relief will be granted, and the public character doctrine probably does no more than strengthen this rule.

The cases under the advertising provision of the statute have not been considered here. The provision covering trade purposes will be seen, from the discussion above, to have received a rather limited, if somewhat inconsistent construction. New York's court of last resort

³⁹ 210 N. Y. 51, 103 N.E. 1108 (1913).

⁴⁰ *Toscani v. Hersey*, 271 App. Div. 445, 65 N. Y. S. (2d) 814 (1946). The action grew out of defendant's novel, "A Bell for Adano," wherein plaintiff alleged he had been depicted.

⁴¹ 191 App. Div. 501, 181 N. Y. S. 481 (1920).

⁴² See comment in note 47 *post*.

⁴³ See *Jeffries v. New York Evening Journal Pub. Co.*, 67 Misc. 570, 124 N. Y. S. 780 (1910); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. S. 752 (1919); *accord*, *Sweenek v. Pathe News*, 16 F. Supp. 746 (E. D. N. Y. 1936) (fat woman reducing in newsreel); *But cf.* *Blumenthal v. Picture Classics, Inc.*, 235 App. Div. 570, 257 N. Y. S. 800 (1932), *aff'd*, 261 N. Y. 504, 185 N.E. 713 (1933).

has not ruled upon all of the points. It is suggested that the failure of the New York courts to recognize the right of privacy at common law has prevented a liberal interpretation of the statute, and that the unfortunate *Roberson* decision has ossified the New York law. If the right is to be further protected in that jurisdiction, the remedy must come from the legislature. Stare decisis and the passage of the incomplete statute prevent the recognition of the common law right at this time, and the illiberal interpretation of the statute has further embedded the concept of a truncated right of privacy into the jurisprudence of New York.

II. *Where the Right Is Acknowledged to Exist at Common Law.*

Having considered the scope of the interests to be protected under the rather narrow New York statute, we now turn to those jurisdictions where the right of privacy is acknowledged to exist at common law. The majority of the jurisdictions recognizing the right fall within this class, although it will be seen that some of them intermingle the common law right with constitutional bases.

Generally, the recognition of the right of privacy in the jurisdictions recognizing the common law right extends further than protection against uses for advertising or a strict definition of the purposes of trade. It shall be assumed that the purposes of trade, generally, do not include news and feature stories in magazines, newsreels, and factual books, although it may be difficult to perceive that magazines, books, and newspapers exist for purposes other than trade in its broad sense. The qualifications of the general statement above concerning the scope of the right in the common law jurisdictions will occupy the rest of this part of the discussion.

The case upon which subsequent recognition of the right of privacy seems to rest is *Pavesich v. New England Life Ins. Co.*,⁴⁴ decided in Georgia in 1904. There the fact situation was similar to that of the *Roberson* case, and a contrary conclusion was reached. The court put the right of privacy on the basis of a natural right, holding that both federal and state constitutions protected it, recognizing it to exist at common law. The case was followed in Georgia by *Bazemore v. Savannah Hospital et al.*⁴⁵ There the plaintiff's stillborn child, which was congenitally deformed, was photographed by the defendant photographer at the request of plaintiff. The photograph was released by the defendant hospital to the defendant newspaper. While the photographer was sued on the basis of breach of contract and the hospital for a breach of trust, the newspaper was sued for the invasion of the right of privacy. While there is generally no right of action in the heirs

⁴⁴ 122 Ga. 190, 50 S.E. 68 (1904).

⁴⁵ 171 Ga. 257, 155 S.E. 194 (1930).

of a deceased person, the plaintiff's right of privacy itself was held to be violated. There were intimations that there would have been a like result merely because of the mental anguish inflicted on plaintiffs.⁴⁶ Whether the same result would have been reached in New York is questionable. Perhaps the event of the birth of a child so deformed (the heart was outside the body) would have been held to constitute a legitimate news story.⁴⁷

Another case which goes beyond the restricted rule in New York is *Canon v. Baskin, et al.*⁴⁸ There, Marjorie K. Rawlins (Baskin), author of the popular novel *The Yearling*, had written an autobiography in which she depicted the environs of plaintiff's residence, and in which plaintiff herself figured as a character. The book recounted her colorful language and her way of life. No allegations were made that the representation was not true. She was referred to by her first name only, but the person referred to was unmistakable. The court said that the delineation of plaintiff and her ways was a "pen portrait recognizable to all," and, by virtue of the natural right of privacy and also by virtue of the provisions of the Florida Constitution,⁴⁹ that for every injury there should be a remedy afforded, the plaintiff was entitled to relief. Liberty of the press, the court said, did not go so far as to infringe the plaintiff's right of privacy. After a retrial, the case came up again.⁵⁰ It was held that there was no legitimate public interest in the plaintiff (a point not raised on the first appeal). A verdict in favor of defendant was reversed because of defendant's highly prejudicial evidence. Defendant attempted to show, by the popularity of her books, that any subject of her writing was in the legitimate public interest. Nominal damages only were permitted, because there was no malice, and because no substantial damages were proved.

⁴⁶ See *Fitzsimmons v. Olinger Mortuary Ass'n.*, 91 Colo. 544, 17 P. (2d) 535 (1932). There, damages were allowed plaintiff on the theory of mental damages only, where defendant undertaker used pictures of plaintiff's deceased husband in an advertisement. There was the breach of a contract. See *Hall v. Jackson*, 24 Colo. App. 225, 288, 134 Pac. 151 (1913), for possible extension of this rule to cases where no contract, implied or express, exists, but where there is willful or wanton conduct. As Professor Prosser points out, PROSSER ON TORTS 1062 (1941), the "new tort" of intentional mental suffering may swallow the privacy cases as it expands. No attempt has been made here to deal with cases not involving the right of privacy as such, but the analogy to the mental suffering cases is recognized. The two torts of course have somewhat the same basis—the right to undisturbed peace of mind.

⁴⁷ See *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. S. 752, 757 (1919) (Newsreel); *Kimmerle v. N. Y. Evening Journal*, 262 N. Y. 99, 186 N.E. 217, 218 (1933). The *Humiston* case indicates a difference between newsreels, which are news, and ordinary films, which are essentially fiction. 178 N. Y. S. at 755. The distinction is repeated in the dissent in the *Blumenthal* case, *supra* note 43, 257 N. Y. S. 800, 802.

⁴⁸Fla....., 20 So. (2d) 243 (1944).

⁴⁹ FLA. CONST. § 4.

⁵⁰Fla....., 30 So. (2d) 635 (1947).

Arizona, in a recent case,⁵¹ seems also to have adopted a broad view. In that case, the unauthorized circulation of plaintiff's picture in a magazine crime story was held to constitute a good cause of action. The court stated flatly that the alleged tort did not invade any property right, and seemed to distinguish between news stories and magazine articles. The latter do not appear to be considered a legitimate public interest of the same type as news stories.

The common law jurisdictions, however, do not deny the general rule that when one makes news, he waives his right of privacy, and the accordant publicity will be his. Thus, a Kentucky⁵² case,⁵³ upon the authority of *Brents v. Morgan*,⁵⁴ held that a wife who was walking with her husband when he was assaulted and fatally stabbed had no cause of action for the publishing of her statements concerning the matter.

The question is, of course, what constitutes legitimate news. A case which severely limited its scope was *Peed v. Washington Times*.⁵⁵ This case goes about as far as any case has gone in the common law jurisdictions. There, the plaintiff had been involved in what was apparently a double suicide attempt by the use of gas. Her photograph was taken at the hospital, and it was published together with the account of the affair, which the plaintiff alleged was not what it seemed to be. Recovery was allowed. But the court there seemed to base the right of privacy on the rights to "life, liberty, and the pursuit of happiness" found in the Declaration of Independence, and guaranteed by the Constitution of the United States.⁵⁶

Nor do the common law jurisdictions deny the existence of the public character doctrine. This doctrine was carried either to its extreme or its logical conclusion in the famous *Sidis* case.⁵⁷ There the *New Yorker* magazine printed in one of its profiles the later history of *Sidis*, an erstwhile child prodigy who had astounded his elders with

⁵¹ *Reed v. Real Detective Pub. Co.*,Ariz....., 162 P. (2d) 133 (1947).

⁵² Kentucky recognized the right of privacy in *Foster Milburn Co. v. Chinn*, 134 Ky. 424, 130 S.W. 364 (1909).

⁵³ *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. (2d) 972 (1929).

⁵⁴ 221 Ky. 765, 299 S.W. 967 (1927). See *Douglas v. Stokes et ux.*, 149 Ky. 506, 149 S.W. 849 (1912). This case involved the unauthorized filing and copyrighting of photographs of plaintiff's deceased Siamese twins. While the theory of the decision for plaintiffs is not clear, the court in the *Brent* case thought that the only real basis for the decision was the right of privacy.

⁵⁵ *Peed v. Washington Times*, 55 Wash. L. Rep. 182 (Sup. Ct. D. C. 1927). The most recent District of Columbia case is *Elmhurst v. Pearson*, 153 F. (2d) 467 (App. D. C. 1946), where the usual waiver rule in "news" cases is applied, but where the court seems to reopen the entire question of the right of privacy, refuses to say definitely whether it exists or not, and ignores the *Peed* case.

⁵⁶ See Note, 138 A. L. R. 22 at 30.

⁵⁷ 34 F. Supp. 19 (S. D. N. Y. 1938), *aff'd*, 113 F. (2d) 806 (C. C. A. 2d 1940).

erudite discussions of learned topics, and who had been graduated from Harvard at sixteen. Exploitation, plus perhaps psychopathic tendencies, had driven Sidis to solitude; he had deliberately chosen an obscure neighborhood for residence and avoided publicity, working as a clerk. The *New Yorker* ferreted him out and published its profile against his wishes. Sidis sued, alleging a breach of his right of privacy. Besides the law of New York, the decision involved that of California, Kansas, Georgia, Kentucky, and Missouri. It was held that, once he had stepped into the public eye as a prodigy, Sidis waived his right to privacy and must thereafter submit himself to whatever prying the press might care to pursue, and that a lapse of twenty-five years since his comet had brightened the Harvard Yard was not enough to secure him the privilege of seclusion. The case, although there is good ground for the argument that it was wrongly decided,⁵⁸ gives a complete discussion of the right of privacy generally and in particular of the right to depart from the public eye once one has entered it. The public was held to have a continuing interest in the prodigy who had astonished it a quarter of a century before. It is not clear what manner of withdrawal from the public curiosity would effect a sufficient seclusion, nor the length of time the seclusion would have to endure to restore the right of privacy after waiver had taken place.⁵⁹

Michigan, the latest jurisdiction to rule on the point, has held that the right of privacy is a common law right.⁶⁰ However, the Michigan court had before it a clear case of an unauthorized appropriation of plaintiff's picture for commercial purposes, and intimated a different result where considerations of freedom of the press were involved.

A federal court sitting in Massachusetts has ruled that there is no recognized right of privacy in Massachusetts, except what is actionable under the broad definition of libel—that which discredits plaintiff in the view of a considerable and respectable class of the community.⁶¹

⁵⁸ See, however, the remarks of Lusk, J., in *Hinish v. Meier & F. Co.*,Ore...., 113 P. (2d) 438, 447 (1941).

⁵⁹ Eighteen months was more than the limit in *Mau v. Rio Grande, Inc.*, 28 F. Supp. 845 (N. D. Cal. 1939), where a radio broadcast dramatizing plaintiff's holdup greatly upset the plaintiff and invaded his privacy. The public's interest in public persons of yore is strikingly illustrated by the *New Yorker* series, "Where Are They Now?" of which the Sidis profile was one. Apparently none of the others profiled took umbrage.

⁶⁰ *Pallas v. Crowley, Milner & Co.*,Mich...., 33 N.W. (2d) 911 (1948). There the court, on reconsidering the right of privacy, disapproved apparently contrary expressions in *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899).

⁶¹ *Wright v. R. K. O. Radio Pictures, Inc.*, 55 F. Supp. 639 (Mass. 1944). There the court said that *Themo v. New England Newspaper Publishing Co.*, 306 Mass. 54, 27 N.E. (2d) 753 (1940) held that proposition. A reading of the *Themo* case seems to justify no such narrow interpretation. That case seems to have held that the same result might have been reached under the broad definition of libel,

Other jurisdictions which generally recognize the right of privacy have not ruled on the specific points here involved.⁶²

In general, therefore, it appears that the jurisdictions which have considered the subject from the point of view of the common law right of privacy have come to a more liberal conclusion in reference to uses which are not clearly commercial under the narrow New York view. In particular, Georgia, Arizona, Florida, and perhaps the District of Columbia seem to have adopted in substance, at least, the philosophy behind the Brandeis-Warren article, which New York has never done. Indeed, there seems to be lurking behind the statute and its interpretations a tacit assumption that what is being dealt with is a right of

citing, inter alia, *Burton v. Crowell Pub. Co.*, 82 F. (2d) 154 (C. C. A. 2d 1936); *Merrill v. Post Pub. Co.*, 197 Mass. 185, 190, 83 N.E. 419 (1908); *Tolley v. S. J. Fry and Sons, Ltd.*, [1931] A. C. 333. The court interestingly intimated that the *Roberson* case might have been likewise decided. 27 N.E. (2d) at 755. Truth, however, is no defense to an action of the right of privacy. In the *Themo* case, the plaintiff was shown in the company of a police captain, which the court thought was a matter of legitimate public interest.

⁶² See, for the recognition of the right: Alaska: *Smith v. Suratt*, 7 Alaska 416 (1926); Colorado: *McCreery v. Miller's Groceteria* (Colo. Sup. Ct. Mar. 25, 1936), unreported, cited in Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 529 (1939); compare with note 46 *supra*; Indiana: *State ex rel. Mavity v. Tyndall*,Ind., 66 N.E. (2d) 755 (1946) (right recognized but relief denied in a "fingerprint" case); Kansas: *Kunz v. Allen*, 102 Kan. 883, 172 Pac. 532 (1918) (advertising); Louisiana: *Itzkovitch v. Whitaker*, 165 La. 487, 39 So. 499 (1905); Nevada: *See Norman v. Las Vegas*,Nev., 177 P. (2d) 442, 446 (1947); North Carolina: *Flake v. Greensboro News Co.*, 212 N. C. 780, 195 S.E. 55 (1938) (indicating a restriction on the right to cases where there was a clearly commercial violation, perhaps in the sense of the New York decisions); Oklahoma: *See Paramount Pictures v. Leader Press*, 24 F. Supp. 1004 (W. D. Okla. 1938) (implies that right exists in Okla.); South Carolina: *See Hollman v. Life Ins. Co. of Virginia*, 192 S. C. 454, 7 S.E. (2d) 169, 171 (1940) (where the court indicated that South Carolina might interpret the right liberally).

The following jurisdictions have not decided the question of the existence of the right of privacy in their courts of last resort; lower court opinions holding or indicating its existence follow: Illinois: *Blazek v. Rose* (Cir. Ct. Cook County, Ill., 1922), unreported, but cited in Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526, 529 (1939); Maryland: *Graham v. Baltimore Post* (Superior Ct. of Baltimore City, 1932), unreported officially but printed in full in 22 Ky. L. J. 108 (1933). The excellent opinion of Judge Eugene O'Brien in the *Graham* case reviews all the cases and law review articles down to 1932 and accepts the right of privacy as common law. He saw no reason, he said, to indulge in tortuous fictions to reach the same conclusions on theories of property rights, contracts, trusts, defamation, etc. The case involved an advertising use, but the judge seemed to argue for an extensive right, citing, inter alia, an Indian decision, *Gokal Prasad v. Roho*, India Law Rep. 10 Allahabad 358 (1888), to sustain his rather original viewpoint. Pennsylvania: *Harlow v. Buno Co.*, 36 Pa. D. & C. 101 (1939); *Clayman et ux. v. Bernstein*, 38 Pa. D. & C. 543 (1940).

Ohio's position is vague. The cases are not available to the writer, but see, if available, *Friedman v. Cincinnati Local Joint Executive Board*, 20 Ohio Op. 473 (1941).

property—in one's photograph, for instance, instead of with a right of inviolate personality. While the New York courts have never made such a statement, the assumption is there, nevertheless. Brandeis and Warren were not talking about injuries arising from the appropriation of property—one's face—but injuries arising because of injuries to personality—mental injuries, if one wishes to call them that. They were concerned over the tendency of the press to print "idle gossip . . . procured by intrusions on the domestic circle."⁶³ While it was never, of course, their intent to curtail legitimate public dissemination of news, they did not visualize that category as containing every morsel of erotic intrigue and every sensational or morbid photograph which the public media of information might care to disseminate. The remedy offered by the New York courts for such invasions is rather vague, if it exists at all. On the other hand, decisions such as that in the *Peed* case embody the Brandeis-Warren argument, even though they may seem to carry it beyond its original scope. The only New York decisions to indicate a possible broader basis are from lower courts.⁶⁴ Kentucky indicates a reasonable latitude for the press,⁶⁵ while Michigan seems to be going in the direction of New York.⁶⁶

It is clear that a consistent interpretation of the right of privacy in accord with the position of the Restatement of Torts,⁶⁷ the best exposition of that right (which many courts cite but few follow), would result in a broader interpretation than now prevails generally even in the common law jurisdictions.

III. *Where the Right Is Held to Be Protected by State Constitutions.*

In the third category of jurisdictions which recognize a right of privacy, those which hold it protected under the constitutions of those states, the states of California and Missouri have decided the point under consideration here.⁶⁸ In Florida, as previously noted, the right is acknowledged as existing at common law and protected under the provision of the Florida Constitution granting a remedy for every wrong.⁶⁹

In California, in the leading case of *Melvin v. Reid, et al.*,⁷⁰ a motion picture was made of the life of a reformed prostitute, using

⁶³ Brandeis and Warren, *op. cit. supra* note 1.

⁶⁴ See, e.g., the first opinion in the *Martin* case, *supra* note 29, and the *Selmer* case, *supra* note 36.

⁶⁵ See note 54 *supra*.

⁶⁶ *Pallas v. Crowley, Milner & Co.*, *supra* notes 12 and 60.

⁶⁷ RESTATEMENT, TORTS § 867 (1939).

⁶⁸ New Jersey also holds the right or its modification protected by the state constitution. See note 13 *supra*.

⁶⁹ See notes 48 and 49 *supra*.

⁷⁰ 112 Cal. App. 285, 297 Pac. 91 (1931). The right of privacy rules as seen by the court are set out at p. 93 of 297 Pac.

her real name. She brought suit alleging the invasion of her right of privacy. While the court found that no common law right of privacy existed, they found also that the film breached the plaintiff's constitutional right of pursuing and obtaining safety and happiness.⁷¹ The court said,⁷²

The use of appellant's true name in connection with . . . the plot and advertisements was unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society. . . . Even the thief on the cross was permitted to repent during the hours of final agony.

Here the matter had ceased to be news (if indeed it ever was news in a proper sense) and the defendant was exhuming old bones. But the language in the case is striking in its broad range. It seems clear that under California law, much which would not be actionable in New York or in some of the states recognizing the common law right would constitute a tort in California.

The California doctrine is limited by the usual generality that anything of legitimate public interest may be published without infringement of the constitutional rights. In *Metter v. Los Angeles Examiner et al.*,⁷³ the court said,⁷⁴ quoting *Jones v. Herald Press Co.*, *supra*,

"There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence." . . . It might appropriately be observed that public or general interest, as used in the foregoing opinion, is not to be confused with mere curiosity.

What the California courts afterwards construe "legitimate public interest" or "mere curiosity" to mean will, of course, permit either a wide or narrow interpretation of the right of privacy. But California indicates an intent to delimit the scope of public inquiry and information to those cases in which a reasonable interest as distinguished from a morbid or curious interest is discovered. It is suggested that such a distinction is the basis of the true test. When the public has a legitimate and clearly reasonable interest in a person, by virtue either of his public character or of his having for a time abandoned his seclusion to perform in the public arena, he has waived his right of privacy, and cannot thereafter reassert it until his retirement into the obscurity whence he came is complete. He must remain there a sufficient time for all but those endowed either with a preternormal memory or with an insatiable curiosity in the affairs of others to have

⁷¹ CALIF. CONST. § 1.

⁷² 297 Pac. at 93.

⁷³Cal. App., 95 P. (2d) 491 (1939).

⁷⁴ 95 P. (2d) at 494.

forgotten his exploit, or at least to have ceased to be interested in it. There may be situations, and perhaps the *Sidis* case⁷⁵ is one, where the person's extraordinary behavior in isolating himself from his ordinary haunts and pursuits is itself a basis for new public interest of a legitimate nature. But to say this would seem to deny the whole rationale of the right; that he who wishes, may be left alone. Whatever may be the merits of the *Sidis* case, one who has always remained secluded, who has no wish to have his affairs or photograph to adorn the columns of a gossipist, or who has done nothing to throw himself into the permissible area of public perusal, should be permitted to retain his privacy without having his person or affairs publicized.

This permissible area of public perusal has been delimited by the Supreme Court of Missouri. In *Barber v. Time, Inc.*,⁷⁶ the plaintiff was the victim of a disease which induced abnormal eating. She went voluntarily to a hospital. While she was confined there, *Time* magazine, having procured her picture taken in the hospital room, printed it with her case history. She sued; the Supreme Court of Missouri, sustaining her complaint based on the right of privacy against the demurrer of the defendant, held that such a right was recognized in Missouri,⁷⁷ and that defendant's article and picture violated that right. The court quoted the *Restatement of Torts, supra*,⁷⁸ and cited with favor the Brandeis-Warren article.⁷⁹ They further said that the right is "a part of the right to liberty and the pursuit of happiness." This statement, as the court recognized, is based on the similar concept in California. There was slight ambiguity in the expression of the exact theory to which the court adhered; for while they cited the California holding with approval, they also said that the right was "natural." The court seems to have meant that while the right was a natural one, its legal protection in Missouri lay in the constitution of the state.⁸⁰ The holding was clearly that the right rests on constitutional grounds. The court said,

Our sections . . . state the same principles (as California) . . . Thus the right of privacy (as well as freedom of the press) is, or at least flows out of, a constitutional right.

This conception of the right of privacy opened the door to the conclusion which followed. If, reasoned the court, the right of privacy is to be equated to the right of freedom of the press in constitutional importance, the enjoyment of one must not encroach upon another's

⁷⁵ Discussed *supra* Part I; see note 30 *supra*.

⁷⁶ 345 Mo. 1199, 159 S.W. (2d) 291 (1942).

⁷⁷ *Munden v. Harris*, 153 Mo. App. 652, 134 S.W. 1076 (1911) (The court thought that the right of privacy is a right of property. "One has an exclusive right to his picture, on the score of its being a property right of material profit.")

⁷⁸ See note 67 *supra*.

⁷⁹ *Op. cit. supra* note 1.

⁸⁰ Mo. CONST. Art. 2, §§ 1-4.

enjoyment of the other, equally protected right. The press must not overlook its correlative constitutional duty of preserving the constitutional rights of others. Thus the correlation of right and duty prevent the press from publishing matter which

. . . is outside the scope of proper public interest and (when) there is substantial evidence tending to show a serious, unreasonable, unwarranted, and offensive interference with another's private affairs, the case is for the jury.

This rule does not abridge the freedom of the press, the court said, because it merely limits the abuse of that freedom. The facts in the *Barber* case were held to present a jury question.

The court in the *Barber* case relied heavily upon the fact that intimate hospital and medical care was involved. Perhaps the court might not be willing to go so far, with such a seeming broadness of language, in a case where less delicate matters were presented. Nevertheless, the case is at least authority for the proposition that in Missouri,

. . . Whatever the limits of the right of privacy may be . . . it must include the right to have information given to or gained by a physician in his treatment of an individual's personal ailment kept from publication which would state his name in connection therewith . . . without consent . . . any right of privacy ought to protect a person from publication of a picture taken without consent while ill or in bed for treatment or recuperation.

The court held that the punitive damages requested were not available,⁸¹ without allegations of libel. As a general rule, said the court, libel and violation of the right of privacy should be stated in separate counts, citing *Munden v. Harris, supra*.

Thus it appears that Missouri does not confine relief under its constitutionally protected natural right theory to cases where there has been a breach of the type for which New York grants relief. Whether the same result would be reached in New York under the statute or in the states which recognize the common law right, is of course not to be categorically answered. The question must be presented to the courts of those states for determination. Surely, however, relief would be granted by California, Arizona, Florida, and Georgia; probably by Kentucky and South Carolina. Michigan's position is too vague at present for a guess to be hazarded. New York, it is ventured, would deny relief under the present law, unless some special relationship of trust could be made to appear. Perhaps the few decisions from New York favoring a widening of relief might be invoked to sustain it in such a case.

On sound legal and ethical principles, the Missouri view is desirable. It has been hitherto submitted that the correct interpretation of

⁸¹ Compare the provisions of the New York and Utah statutes, *supra* notes 16 and 14 respectively.